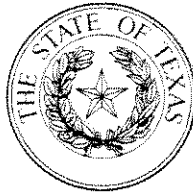


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 25, 2012

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-11-3522; TCEQ Docket No. 2010-0837-WR; In Re:
Application by City of Lubbock for Amendment to Water Use Permit No. 3985

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **June 14 2012**. Any replies to exceptions or briefs must be filed in the same manner no later than **June 25, 2012**.

This matter has been designated **TCEQ Docket No. 2010-0837-WR; SOAH Docket No. 582-11-3522**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard R. Wilfong".

Richard R. Wilfong
Administrative Law Judge

RRW/lis
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: CITY OF LUBBOCK
SOAH DOCKET NUMBER: 582-11-3522
REFERRING AGENCY CASE: 2010-0837-WR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	<u>ADMINISTRATIVE LAW JUDGE</u> ALJ RICHARD WILFONG
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MARIANNE AND JOHN LOVELESS

**SOAH DOCKET NO. 582-11-3522
TCEQ DOCKET NO. 2010-0837-WR**

CONCERNING THE APPLICATION	§	BEFORE THE STATE OFFICE
BY THE CITY OF LUBBOCK FOR	§	
AMENDMENT TO WATER USE	§	OF
PERMIT NO. 3985	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The City of Lubbock, Texas (Lubbock or City) seeks approval from the Texas Commission on Environmental Quality (TCEQ or Commission) of its Application to amend its Water Use Permit No. 3985 (Permit 3985). The permit was issued to the City in 1983, by the predecessor agency of the TCEQ. The amendment would allow the City to use of the bed and banks of the North Fork Double Mountain Fork of the Brazos River (North Fork) to convey up to 32,991 acre-feet per year of groundwater-based and imported surface water-based return flows 2.7 miles downstream were it would be diverted, less carriage losses, for reuse for municipal and recreational purposes in addition to the industrial and irrigation purposes authorized in the existing permit.

Protestants, R. E. Janes Gravel Company (Janes Gravel) and Lynn Forrest, are senior water rights holders authorized to divert and impound state water from the North Fork downstream from Lubbock's proposed diversion point. Protestants and the Office of Public Interest Counsel (OPIC) recommend the Application be denied or, in the alternative, that a special condition be added requiring a pass through of a portion of the discharged return flows sufficient to protect senior water rights and to maintain instream uses.¹ The Commission's Executive Director (ED) supports the Application.

The Administrative Law Judge (ALJ) finds that Lubbock has met the requirements for amendment of Permit 3985. The Application should be approved authorizing the City to use the bed and banks of the North Fork for conveyance and diversion of its developed water-based

¹ OPIC proposes a pass-through of five percent. Protestants propose a pass-through of 1,000 acre-feet, or that they at least have a call on Lubbock's diversion to satisfy their water rights.

return flows in accordance with the terms and conditions of the draft permit (draft Permit 3985A), including the special conditions proposed by the ED and agreed to by Lubbock.²

I. INTRODUCTION

Lubbock is located on the Southern High Plains in the heart of the Llano Estacado—a vast, flat, geographic region covering tens of thousands of square miles of West Texas. The area receives only 16-20 inches of precipitation annually and has a semi-arid climate. Although situated within the Brazos River Basin, Lubbock has traditionally received none of its public water supply through diversions from the Brazos River or its tributaries. This is because the Brazos River tributaries in the vicinity of Lubbock have extremely limited, intermittent flows. Rather, Lubbock has satisfied the water needs of its citizens with a combination of imported surface water, groundwater produced from the Ogallala Aquifer, and reuse of treated effluent.³

Permit 3985 currently authorizes Lubbock to reuse up to 22,910 acre-feet of treated effluent per year, created as a result of the use of state water purchased from the Canadian River Municipal Water Authority (CRMWA) and imported from Lake Meredith in the Canadian River Basin.⁴ Up to 4,480 acre-feet of the treated effluent may be supplied for industrial use at the Southwestern Public Service Company electric generating station in Lubbock County, and up to 18,430 acre-feet may be supplied for agricultural use for the irrigation of 10,000 acres of land in Lubbock and Lynn Counties.⁵

In addition to the imported surface water supplies referenced in Permit 3985, the City also relies heavily on groundwater produced from the Ogallala Aquifer through groundwater wells that it owns in Bailey County and groundwater produced in Roberts County and purchased

² ED Ex. 10; Lubbock Ex. 8. The inclusion of “3985A” in the numbering of the ED’s and Lubbock’s exhibits is omitted from the cites in this Proposal for Decision (PFD) for simplification.

³ Lubbock Ex. 1 at 18, Ex. 6, and Ex. 9 at 10 and 11.

⁴ Lubbock Ex. 9 at 10.

⁵ Lubbock Ex. 2 at 1.

from CRMWA. In recent years the amount of water available from Lake Meredith has been dramatically reduced, causing the City to rely predominately, and sometimes exclusively, on its groundwater resources.⁶

In May 2003, Lubbock began discharging a small portion of its treated effluent through an engineered outfall (Outfall No. 001) into the North Fork in accordance with TPDES Permit No. WQ0010353002 issued by TCEQ (TPDES Permit) which allows the City to discharge up to 9 million gallons per day (10,081 acre-feet per year).⁷ Consistent with the City's historical efforts to make additional beneficial uses of its treated effluent, the City submitted the Application that is at issue in this proceeding to TCEQ in April 2004. It was declared administratively complete on October 12, 2004.

The City's Application seeks an amendment to Permit 3985. The amendment addresses a number of things:

- It reflects that Lubbock has increasingly relied on groundwater produced from the Ogallala Aquifer through water wells in Bailey County and Roberts County in addition to the imported surface water referenced in Permit 3985.⁸
- It acknowledges that, for the first time in May 2003, Lubbock began discharging small volumes of imported surface-water based and groundwater-based treated effluent into the North Fork from engineered Outfall No. 001, pursuant to the TPDES Permit.⁹
- Because the City's discharge of groundwater-based treated effluent is an addition to the 22,910 acre-feet of imported surface water-based treated effluent specified in Permit 3985, the amendment requests a total reuse authorization of 32,991 acre-feet per year.¹⁰

⁶ Lubbock Ex. 9 at 10-11.

⁷ Lubbock Ex. 9 at 12-13.

⁸ Lubbock Ex. 9 at 11.

⁹ Lubbock Ex. 1 at 10, Ex. 3 at 1, Ex. 8 at 1, and Ex. 9 at 14.

¹⁰ ED Ex. 5 at 2.

- It seeks to allow Lubbock to use the bed and banks of the North Fork to transport up to 32,991 acre-feet per year of return flows¹¹ discharged from Outfall No. 001 to a diversion point located 2.7 miles downstream where the volume of flow actually discharged from Outfall No. 001, less carriage losses, would be diverted for reuse.
- It seeks to expand the authorized purposes of reuse to include municipal and recreational purposes, in addition to the industrial and irrigation purposes authorized in the existing permit.¹²

After concluding that the Application, if granted, would not adversely affect any water rights in the Brazos River Basin,¹³ the ED issued draft Permit 3985A on August 2, 2006.¹⁴

II. NOTICE AND JURISDICTION

On May 5, 2010, the Commission issued an Interim Order granting hearing requests and referring this case to the State Office of Administrative Hearings (SOAH) for a hearing.¹⁵ On May 13, 2010, TCEQ mailed notice of the preliminary hearing to each person who requested a hearing. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

At the March 23, 2011 preliminary hearing, evidence was offered to show that the Commission has jurisdiction to consider and grant the Application and that SOAH has jurisdiction to conduct a hearing and prepare a Proposal for Decision.

¹¹ Return flows are treated wastewater or unused portions of diversions that are discharged into watercourses in the state.

¹² Lubbock Ex. 9 at 11-15.

¹³ ED Ex. 4 at 2.

¹⁴ Lubbock Ex. 8; ED Ex. 5 at 1.

¹⁵ *AN INTERIM ORDER concerning the application by the City of Lubbock to Amend Water Use Permit No. 3985; TCEQ Docket No. 2010-0837-WR (February 14, 2011)(Interim Order).*

The ALJ finds that notice of the Application, the opportunity for a hearing, and the hearing on the merits, were in accordance with Tex. Water Code Ann. (Water Code) §§ 11.128 and 11.132 and Tex. Gov't. Code Ann. §§ 2001.051 and 2001.052.

III. PARTIES AND PROCEDURAL HISTORY

The following were admitted as parties to this proceeding:

Party	Representative(s)
City of Lubbock	Jason Hill and Martin Rochelle, attorneys
ED	James Aldredge, attorney
OPIC	James Murphy, attorney
Janes Gravel	Paul M. Terrill, III and Scott Shoemaker, attorneys
Lynn Forrest, The Forrest Family Partnership, Martha Jean Forrest McNeely, Marianne Loveless, and John Loveless	Lynn Forrest, <i>pro se</i>
Clark Wood, Jr.	George H. Nelson, attorney

Clark Wood, Jr. formally withdrew as a party. Lynn Forrest, individually, was represented at the hearing by Oscar Jackson, attorney, but presented no direct evidence. The Forrest Family Partnership, Martha Jean Forrest McNeely, Marianne Loveless and John Loveless did not appear at the hearing.

These were the major procedural events in this case:

DATE	ACTIVITY
April 27, 2004	Lubbock filed its Application to amend Permit 3985 with TCEQ.
October 12, 2004	The ED declared the Application administratively complete.

December 22, 2004	TCEQ mailed Notice of the Application to all water right holders downstream of Lubbock's proposed diversion point.
January 14, 2005	Lubbock published Notice of the Application in the <i>Lubbock Avalanche Journal</i> .
February 10, 2005	TCEQ mailed Notice of the Application to two additional downstream water rights holders.
August 2, 2006	ED issued draft Permit 3985A.
August 25, 2006	Lubbock submitted the Lubbock Water Accounting Plan (LWAP) for the draft permit.
February 14, 2011	Commission issued an Interim Order granting hearing requests and referring this case to SOAH for a contested case hearing.
February 25, 2011	Notice of preliminary hearing on the Application was issued by the Chief Clerk of the TCEQ.
March 23, 2011	SOAH held a preliminary hearing, established jurisdiction, designated parties, established a procedural schedule, and set the hearing on the merits.
September 28, 2011	All discovery concluded.
October 13, 2011	SOAH held a prehearing conference to rule on objections to prefiled testimony and exhibits.
October 18 and 19, 2011	Hearing on the merits.
December 7, 2011	Parties filed written closing arguments.
January 4, 2012	Parties filed replies to written closing arguments.
January 23, 2012	Lubbock filed a supplemental reply brief.
March 22, 2012	SOAH held a post-hearing conference to receive additional legal argument.
April 4, 2012	Final hearing transcript received and record closed.

IV. APPLICABLE LAW

Water rights permit applications are generally governed by Chapter 11 of the Water Code and Chapters 295 and 297 of Title 30 of the Texas Administrative Code (TAC). In particular, Lubbock's proposed use of the bed and banks of the North Fork for conveyance, downstream diversion, and indirect reuse of return flows is governed by Water Code § 11.042. This statute provides, in relevant part, as follows:

Sec. 11.042. DELIVERING WATER DOWN BANKS AND BEDS. (a) Under rules prescribed by the commission, a person . . . may use the bank and bed of any flowing natural stream in the state to convey the water from the place of storage to the place of use or to the diversion point of the appropriator.

...

(b) A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.

(c) Except as otherwise provided in Subsection (a) of this section, a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, . . . instream uses, and freshwater inflows to bays and estuaries. Water discharged into a watercourse or stream under this chapter shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered.

Additionally, pursuant to Water Code § 11.122, Lubbock must obtain approval from the Commission before changing the place of use, the purpose of use, the diversion point, the diversion rate, or the irrigation acreage, or in any other way altering a water right. Although the

Application does not purport to seek authorization to appropriate any state water, the City is seeking changes to what is already provided in Permit 3985: to add new purposes of use, establish a diversion point and a diversion rate, and expand the place of reuse to encompass all of Lubbock and Lynn Counties. Therefore, § 11.122 is applicable and requires a showing that the proposed amendment will not adversely impact existing water rights or the environment on the stream.

There is disagreement among the parties concerning whether Water Code §§ 11.046 and 11.134, also apply. Lubbock and the ED argue that neither of these statutes are applicable to the Application. Protestants and OPIC contend they are.¹⁶ As further discussed below, the ALJ finds that § 11.046 is not applicable, but § 11.134 is applicable, in part.

Water Code § 11.046(a) provides “[A] person who diverts water from a watercourse . . . shall conduct surplus water back to the watercourse from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so.” None of the water being discharged into the North Fork by the City was diverted or taken from the North Fork or any other tributary in the Brazos River Basin. Rather, water discharged by the City is comprised of groundwater-based and imported surface water-based return flows and is not surplus water to which Water Code § 11.046 applies. The City’s return flows are not surplus water. “Surplus water” is defined as “water in excess of the initial or continued beneficial use of the appropriator.”¹⁷ Use of the term “appropriator” infers that surplus water returned to a watercourse is derived from state water.

¹⁶ Tr. March 22, 2012, post-hearing conference.

¹⁷ Water Code § 11.002(10).

For the Commission to grant a water-right application, Water Code § 11.134(b) requires proof that:

- The application complies with procedural requirements;
- “unappropriated water” is available in the source of supply;
- the “proposed appropriation” will be beneficial, will not impair existing water rights or riparian rights, will not be detrimental to the public welfare, considers the environmental assessments performed under other Water Code sections, addresses a water supply need that is consistent with the state water plan and relevant regional water plans; and
- reasonable diligence will be used to achieve water conservation.

Since the Application does not seek an authorization to appropriate any state water, the provisions of § 11.134 concerning appropriations are not applicable. However, the remaining provisions of the statute do apply. It is noteworthy that notwithstanding Lubbock’s position that § 11.134 is not applicable, it has nonetheless undertaken to demonstrate its Application would satisfy the requirements of § 11.134, and the ED’s analysis of Lubbock’s Application encompassed the requirements of § 11.134 as well. Accordingly, the ALJ considers below the evidence offered regarding that statute’s concerns.

V. EVIDENCE, ARGUMENTS, AND ANALYSIS

A. City of Lubbock

The City presented the testimony and exhibits of Aubrey Spear, P.E., the City’s Director of Water Resources,¹⁸ and the expert testimony of David D. Dunn, P.E., a Vice President for HDR Engineering.¹⁹

¹⁸ Lubbock Exs. 1 through 8.

¹⁹ Lubbock Exs. 9 through 12.

Mr. Dunn testified that the Application is not a request to divert or use any state water. Stated differently, the City has only requested the ability to convey, divert and reuse the return flows that originate from the City's discharges made at Outfall No. 001.²⁰ Accordingly, Mr. Dunn explained that if the Application is granted, nothing in the requested draft Permit 3985A would allow the City to divert flows native to the Brazos River Basin, including the North Fork.²¹ Further, according to Mr. Dunn, the amendments sought in the Application pose no adverse impact to existing water rights, instream flows, freshwater inflows to estuaries, or water quality in the Brazos River Basin,²² and these conclusions were independently confirmed by TCEQ Staff's technical review of the Application.²³ Mr. Dunn testified that after considering each of the statutorily required factors, the TCEQ technical staff confirmed that the amendments requested in the Application would not adversely impact existing water rights or instream uses. Moreover, Mr. Dunn explained that the ED's draft Permit 3985A includes several special conditions, the requirements of which provide multiple layers of protection to existing water rights, instream uses, and the environment, including:

- The downstream diversion rate would be tied directly to the rate the City is actually discharging at Outfall No. 001;²⁴
- The City's diversions would be subject to TCEQ-approved water conservation and drought contingency plans;²⁵
- The City's authorization to divert would be an interruptible authorization conditioned on the availability of flows actually discharged at Outfall No. 001;²⁶
- The City would be required to construct the diversion facilities using intake screens designed to minimize the threat of entraining and impinging aquatic organisms;²⁷

²⁰ Lubbock Ex. 9 at 15.

²¹ Lubbock Ex. 9 at 42.

²² Lubbock Ex. 9 at 41 and 45 through 49,

²³ Lubbock Ex. 9 at 30.

²⁴ Lubbock Exs. 8 at para. 3.A., 6.A., and 6.C. and 9 at 31-34; ED Ex. 11 at 15.

²⁵ *Id.*

²⁶ *Id.*

- The City would be required to install measuring devices capable of accurately measuring the quantities of return flows discharged and diverted, and to maintain records for verification; and
- The draft Permit 3985A would incorporate an Accounting Plan requiring recordation of discharge flows, carriage loss calculations, and diversions to assure compliance with the terms and conditions of the permit.²⁸

B. Executive Director

The ED presented the testimony and exhibits of Ron Ellis, Manager of the Water Rights Permitting and Availability Section of TCEQ, who prepared the ED's draft Permit 3985A,²⁹ and Kathy Alexander, Technical Specialist in the Water Rights Permitting and Availability Section of TCEQ, who served as the ED's "technical lead."³⁰ The ED's exhibits included Stephen Densmore's Water Availability Memorandum³¹ and an addendum thereto;³² John Botro's Environmental Analysis Memorandum³³ and an addendum thereto;³⁴ Dean Minchillo's Water Conservation Memorandum;³⁵ and Scott Swanson's Conservation memorandum.³⁶ In summary, Mr. Ellis and Ms. Alexander testified that:

- all technical reviews required for the Application were performed by TCEQ staff;³⁷

²⁷ *Id.*

²⁸ *Id.*; Lubbock Ex. 12.

²⁹ ED Ex. A-1.

³⁰ ED Ex. A-11.

³¹ ED Ex. A-4. Mr. Densmore is a hydrologist with the TCEQ Hydrology Team.

³² ED Ex. A-5.

³³ ED Ex. A-6. Mr. Botro is an aquatic scientist formerly with the TCEQ Resource Protection Team.

³⁴ ED Ex. A-7.

³⁵ ED Ex. A-8. Mr. Minchillo is a water conservation specialist formerly with the TCEQ Resource Protection Team.

³⁶ ED Ex. A-9. Mr. Swanson is also a water conservation specialist with the TCEQ Resource Protection Team.

³⁷ ED Ex. A-1 at 6.

- the Accounting Plan prepared by the City is consistent with plans previously approved by the ED;³⁸
- the City's calculated carriage losses are conservative and reasonable;³⁹
- an unappropriated water analysis was not necessary because the Application seeks no appropriation of state water;⁴⁰
- no existing water rights were granted based on the City's discharge of return flows into the North Fork at Outfall No. 001 since May 2003;⁴¹
- any contributions to the discharges at Outfall No. 001 attributable to inflow and infiltration⁴² would be privately-owned water belonging to the City;⁴³
- the State Water Plan and relevant Regional Water Plans mention reuse of return flows as a recommended strategy for Lubbock;⁴⁴ and
- draft Permit 3985A includes several special conditions recommended by TCEQ staff that are adequate to maintain instream uses and protect the environment.⁴⁵

C. Janes Gravel

Janes Gravel presented the testimony and exhibits of Ralph E. "Jason" Janes IV, Vice President of Janes Gravel,⁴⁶ and Tom Koch, P.E., Vice President of C. Thomas Koch, Inc., a land and water resources consulting firm.⁴⁷ Janes Gravel contends Lubbock's Application fails to comply with several legal requirements designed to protect senior water rights and must be

³⁸ ED Ex. A-11 at 11.

³⁹ *Id.*

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 13.

⁴² The issue of inflow and infiltration is discussed more fully later in this PFD.

⁴³ *Id.* at 14.

⁴⁴ *Id.* at 15

⁴⁵ *Id.*

⁴⁶ Protestant Ex. A.

⁴⁷ Protestant Ex. B.

denied or, in the alternative, a special condition should require a pass-through of 1,000 acre-feet of the City's return flows discharged at Outfall No. 001, or at least provide a priority call on Lubbock's diversions to satisfy its water right.⁴⁸ Specifically, Janes Gravel's major contentions are that the City's Application: (1) is based on a false premise concerning the source of the return flows, thus allowing the City to divert (a) water native to the Brazos River Basin and (b) historical base flows of the North Fork, to the detriment of senior water rights; (2) uses an unrealistically low estimate of carriage losses that would adversely impact senior water rights; (3) inadequately considers potential harm to the environment and instream uses; and (4) is not consistent with the State Water Plan and relevant Regional Water Plans.

D. OPIC

OPIC presented no evidence, but opposed approval of the Application solely on the grounds that the City failed to meet its burden to prove that draft Permit 3985A will maintain instream uses in the North Fork.

Each of Protestant's and OPIC's challenges to Lubbock's Application and draft Permit 3985A, the responses of the City and the ED, and the ALJ's analysis of the contested issues are discussed below.

E. Discussion

1. Source of Return Flows

Janes Gravel disputes Lubbock's contention that all of the return flow discharged at Outfall No. 001 will consist of developed water,⁴⁹ claiming that the return flows also include

⁴⁸ *Id.* at 56.

⁴⁹ Lubbock's return flows consist of a combination of groundwater-based and imported Canadian River Basin surface water-based treated effluent. Since it is water that would not exist in the Brazos River Basin, but for the actions of the City, it is "developed water."

water native to the Brazos River Basin that enters the City's sanitary sewer system through inflow and infiltration.⁵⁰ Mr. Koch testified that "infiltration and inflow are terms used to describe the ways that native water sources, such as stormwater and groundwater, enter into dedicated wastewater or sanitary sewer systems."⁵¹ He contends infiltration and inflow are not "developed water." Rather, they are natural contributing sources to the flow of the North Fork that are not accounted for in Lubbock's Application. Mr. Koch also contends that for many decades the City's treated effluent has provided a significant portion of the base flow of the North Fork. He testified that prior to the 1930s, Lubbock discharged approximately 1,000 acre-feet of its treated effluent to the North Fork. Then in the 1930s, Lubbock stopped discharging into the North Fork and began land application of its effluent for irrigation purposes. In the 1960s, it became apparent that a significant portion of the land-applied effluent went below ground and formed a large groundwater dome resulting in seeps and springs contributing significant flows to the North Fork.⁵² Janes Gravel argues that its certificate of adjudication issued by TCEQ's predecessor agency in 1968 was based, in part, on the historic base flow contributed to the river by Lubbock's direct discharges and the groundwater dome created by the City's excessive land application. According to Janes Gravel, Lubbock's Application threatens to take this historical base flow away from the North Fork without providing any protection for senior water rights that are dependent upon it.

The City points out that, as acknowledged by Mr. Koch, all municipal sewer systems experience inflow and infiltration.⁵³ However, the City contends that any water that enters its sanitary sewer system through inflow and infiltration would be a *de minimus* amount. Mr. Dunn testified that infiltration occurs when subsurface moisture enters a sanitary sewer system through underground points-of-entry such as incomplete seals, cracks, or other openings in the sewer

⁵⁰ Protestant Ex. B at 34.

⁵¹ *Id.*

⁵² *Id.* at 24-26.

⁵³ Protestant Ex. B at 34.

system's underground pipelines.⁵⁴ The soil surrounding the underground points of entry must be sufficiently saturated so the water moves into the sewer line instead of migrating further underground. Accordingly, the City posited that in instances of infiltration the City would be capturing groundwater in its system. Regarding inflow, Mr. Dunn explained that inflow occurs when storm water runoff enters the sanitary sewer system through surface exposures such as manholes, open cleanouts on house lines, and roof drains connected to the sewer system.⁵⁵ Consequently, the City contends that in instances of inflow the City is capturing diffused surface water that has entered the ground. The City argues the law is well settled that any groundwater captured by infiltration, as claimed by Janes Gravel, would belong to the City to use as it pleases---absent malice, willful waste, or negligent subsidence---and as otherwise might be regulated by a local groundwater conservation district. Lubbock also asserts the law is well settled that any water captured by the inflow of rainwater accumulation on the surface of the ground--commonly referred to in the law as diffused water--is subject to being captured or used until such time as it enters a state watercourse.

As further explanation for its contention that the quantity of water collected by infiltration and inflow would be *de minimus*, Lubbock's witness Mr. Dunn explained that infiltration requires underground points-of-entry and the presence of water-saturated soil at those locations.⁵⁶ Regarding the existence underground points-of-entry, Lubbock argued that contrary to Janes Gravel's claims, the condition of its sanitary sewer system is good compared to other municipalities, mainly because the soil conditions in the Lubbock area are not prone to shifts or other movement that would damage underground sewer lines, as are soils in other parts of the State. Hence, the number of potential underground points-of-entry is not great, as Janes Gravel claims. Regarding the need to also have water-saturated soil at the underground points-of-entry, Mr. Dunn testified that the soils in the Lubbock area are typically dry at the depth of the sewer

⁵⁴ Tr. at 206

⁵⁵ Tr. at 207.

⁵⁶ Tr. at 206.

lines.⁵⁷ Concerning the collection of water attributable to inflow, Mr. Dunn pointed out that inflow is dependent on the occurrence of significant rainfall which happens relatively infrequently in the Lubbock area.⁵⁸

Ms. Alexander, the ED's technical lead, expressed the opinion that any groundwater or rainfall purposefully or inadvertently captured by the City's wastewater system prior to reaching a state watercourse belongs to the City and is not state water subject to appropriation by any water rights owner.⁵⁹

Although the preponderance of the evidence supports Lubbock's position that the volume of water collected by infiltration and inflow is likely *de minimus*, the ALJ finds that whether the volume is great or small lacks legal significance. Agreeing with Ms. Alexander, the ALJ finds the law conclusive that any water collected in Lubbock's sanitary sewer system as a result of infiltration and inflow is not state water, regardless of the volume. Rather, the captured groundwater belongs to Lubbock and is not subject to appropriation or priority call by any surface water right holder.⁶⁰ Janes Gravel's assertion that water collected by infiltration and inflow is not Lubbock's to capture lacks any merit and is without support in the law.

Regarding Janes Gravel's position that its water right was based on the City's direct and indirect contributions to the historical base flows of the North Fork, the ED responded that, prior to obtaining its TPDES permit in 2003, the City had not discharged any treated effluent directly through a discrete conveyance fsince the cessation of direct discharge during the 1930s.⁶¹ The ED and Lubbock point out that even if Janes Gravel's theory that the underground water dome

⁵⁷ Tr. at 206-207.

⁵⁸ Tr. at 208.

⁵⁹ Tr. at 332.

⁶⁰ *Edwards Aquifer Auth. v. Day*, 2012 Tex. LEXIS 161, 55 Tex. Sup. Ct. J. 343 (Tex. Feb. 24, 2012) (per curiam); *Sipriano v. Great spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999); *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 228 (Tex. 1936); *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999); Water Code § 36.002.

⁶¹ ED initial brief at 6 citing Protestant Ex. B at 25.

created by the City's land application has contributed to flow in the North Fork is assumed to be true, it provides no support for Protestant's position. As a matter of definition, water that percolates below the earth's surface is groundwater, a distinct resource from surface water (i.e., state water) under Texas law. Thus, Lubbock and the ED contend that the City has no obligation to maintain any flow in the North Fork that may have been attributable to groundwater levels underlying the Lubbock land application site. The ALJ agrees that Lubbock has no legal obligation to continue discharging into the North Fork any volumes of (1) groundwater that may infiltrate its sewer system; (2) diffused surface water that may inflow into its sewer system; or (3) groundwater created by its past land application practices.

2. Source of Downstream Diversions

Lubbock's Application does not request authorization to divert any component of flows in the North Fork that are considered state water. To the contrary, the only source of flows that the Application concerns are those flows created specifically by return flows at Outfall No. 001. Stated differently, the Application seeks no appropriation of state water and draft Permit 3985A is specifically designed to prohibit the City from making any diversions from the North Fork other than those created by City's return flows discharged from Outfall No. 1.

3. Carriage Losses

The accuracy of Lubbock's carriage loss calculation is a major issue in this case. It is undisputed that carriage losses have three components: (1) seepage into the river bed; (2) evapotranspiration, which is water loss caused by absorption and transpiration from the river by vegetation growing adjacent to the river bed; and (3) evaporation.⁶² An accurate estimate of carriage loss is important because it accounts for return flow that is lost after it enters the river and before it reaches the diversion point. If the estimated carriage loss is too low, too much

⁶² Protestant Ex. B at 38-39; Lubbock Ex. 9 at 20.

water will be diverted by the City at the downstream diversion point and water rights holders located further downstream will be deprived of water to which they have a senior right.⁶³

Janes Gravel contends Lubbock's carriage loss estimate of 0.47% is: (1) too low; (2) not based on actual measurements; (3) based on the false, and therefore inaccurate, assumption that the discharge and diversion would both occur within a lake rather than an intermittently dry river bed as is the case;⁶⁴ and (4) based on unscientific assumptions using annual average evaporation reduced by annual average precipitation to arrive at net annual average evaporation that was then doubled to serve as a surrogate for seepage and evapotranspiration combined. Mr. Koch further testified "it is nonsensical to assume that every day of the year the *same* percent of streamflow is 'lost' regardless of whether it is raining or hasn't rained for months, and regardless of the season of the year."⁶⁵ He advocated that the City should have calculated evaporation on a monthly basis, rather than an annual average basis.⁶⁶

The City rejects Janes Gravel's contentions, arguing that they lack evidentiary support and ignore the fact that the City's carriage loss calculation has been reviewed and endorsed by a number of qualified professionals employed both by the City and TCEQ. Although the City's expert, Mr. Dunn, acknowledges there are other methodologies for determining carriage losses such as the paired discharge method mentioned by Mr. Koch, he nonetheless testified that the methodology used by the City is an industry standard.⁶⁷ Contrary to Janes Gravel's claim that the discharge and diversion were assumed to both occur within a lake, the City points out that its carriage loss estimate considered the actual distance and average width of the North Fork between Outfall No. 001 and the diversion point. The City also challenged Janes Gravel's contention that the paired discharge methodology is a superior method to calculate carriage

⁶³ Protestant Ex. B at 39.

⁶⁴ *Id.* at 37-39.

⁶⁵ Protestant Ex. B at 40.

⁶⁶ *Id.* at 43.

⁶⁷ Lubbock Ex. 9 at 22.

losses by pointing out that it is only representative of the length of time of the study which is inferior to the more than 60 years of historical evaporation and precipitation data used by the City. The City also argues that using 50 percent of the net evaporation as a surrogate for seepage and evapotranspiration is standard industry practice because seepage and evapotranspiration are very difficult to calculate. In this regard, the City emphasized that it doubled the net evaporation rate, rather than using only 50 percent, making the City's calculation highly conservative and abundantly protective of downstream water rights. The City also defended the use of annual averages, instead of monthly or weekly averages, as being an accurate statistical averaging method. The ED's witness, Ms. Alexander, also supported the reliability of the City's carriage loss estimate consistent with the TCEQ technical staff memorandum dated August 15, 2005, which found that the City's estimated carriage losses appear reasonable, and the method used to determine those losses was acceptable.⁶⁸

Considering the entirety of the evidence, the ALJ concludes that the City's estimated carriage loss estimate was derived using industry-standard methodology applied to reliable historical evaporation and precipitation data to arrive at net evaporation that was then conservatively doubled, as opposed to using only 50 percent of the net evaporation found to be sufficient in previous studies, to account for evapotranspiration and seepage. Janes Gravel's contention that the City's carriage loss calculation is based on the fiction that the discharge and diversion would both occur within a lake is contrary to considerable record evidence, including Mr. Koch's own testimony. After making the assertion that the City assumed the discharge and diversion would occur in a lake, Mr. Koch stated that Mr. Carthel assumed an average stream width of 20 feet.⁶⁹

Notably, although critical of the City's carriage loss calculation, Janes Gravel failed to submit an alternative loss factor that it could demonstrate as being more accurate. Moreover, Mr. Koch failed to rebut the opinions of the City's and the ED's experts that the methodology

⁶⁸ ED Exs. 4 and 11 at 11; Lubbock Ex. 9 at 25; Tr. at 310, 313.

⁶⁹ Protestant Ex. B at 41.

employed by the City to calculate the carriage loss was the industry standard and doubling the net evaporation produced a very conservative carriage loss estimate that is more than adequately protective of downstream water rights.

Further, considering Janes Gravel's often repeated argument that seepage losses would be significantly greater for flows entering a dry river bed, it is apparent that Janes Gravel, and other downstream water rights holders, will receive a windfall benefit from the City's discharge of return flows. Use of the bed and banks to transport the City's water to the diversion point will keep a 2.7-mile section of the North Fork saturated, thus less of the natural flow in the North Fork will soak into the ground, leaving more for the downstream water right holders.

4. Maintenance of Instream Uses and the Environment

Regarding the assessment of potentially adverse environmental impacts related to the requested amendments, as required by Water Code § 11.042, Mr. Dunn rendered favorable opinions on behalf of the City. He based his opinions on his review and agreement with the Environmental Analysis and its addendum prepared by John Botros, an aquatic scientist on the TCEQ Resource Protection Team.⁷⁰ Janes Gravel and OPIC argue that Mr. Dunn's opinions regarding environmental impacts are insufficient to sustain Lubbock's burden of proof regarding those issues because he is not qualified to give those opinions. Protestant and OPIC further contend it is inappropriate for the City's expert witness to rely on the ED's Environmental Analysis as the basis for his opinions because the ED is prohibited from assisting the City in meeting its burden of proof concerning these issues. Lubbock and the ED disagree. The ALJ disagrees as well.

The City argues that the criticisms raised by counsel for OPIC and Janes Gravel against the qualifications of Mr. Dunn are baseless and, as a procedural matter, untimely. Lubbock claims the criticisms are baseless because there is nothing in the law to support the argument that

⁷⁰ Lubbock Ex. 9 at 45- 49.

opinions regarding instream uses may only be offered by a biologist. Rather, when the work of others constitutes facts or data that are reasonably relied upon by experts in the field in forming opinions or inferences on the subject, the Texas Rules of Evidence clearly allow expert witnesses like Mr. Dunn, to review and express expert opinions on that work.⁷¹ Accordingly, the City argues that Mr. Dunn responds in his prefiled testimony to a series of questions regarding the scope, breadth, and conclusions reached by TCEQ aquatic scientists during their technical review of the Application, as described in their written environmental analyses.⁷² As described in his prefiled testimony, Mr. Dunn has developed a fundamental understanding of the statutes, rules, and other applicable considerations applied by TCEQ's technical staff to water-right amendment requests like the Application.⁷³ Lubbock argues it is apparent from his testimony that Mr. Dunn was not attempting to provide expert testimony regarding instream use impacts as a biologist. Instead, he was providing expert testimony regarding instream use impacts as a seasoned hydrologist with nearly 20 years of professional experience in the water-resources industry.⁷⁴ According to the City, Mr. Dunn's expert testimony regarding the absence of any adverse impacts on instream uses attributable to the Application and draft Permit 3985A validate the conclusions reached by the ED's aquatic scientists.

Both the City and the ED note that, as a procedural matter, neither Janes Gravel nor OPIC raised any objection, before or during the hearing, to Mr. Dunn's qualifications to provide his expert opinions regarding the absence of any adverse environmental impacts. Nor did they object that his opinions inappropriately relied on the environmental analyses performed by the ED's technical staff. Consequently, the City and the ED argue that any grounds for objection have been waived and Mr. Dunn's testimony was admitted as valid expert opinion and is part of the record in this case.

⁷¹ TEX. R. EVID. 703.

⁷² Lubbock Ex. 9 at 45-47.

⁷³ *Id.* at 5-6.

⁷⁴ *Id.* at 5-6, 46.

The ED notes that although he may not assist the Applicant with meeting its burden of proof,⁷⁵ the ED is charged by statute with the task of performing a review and evaluation of water rights applications.⁷⁶ The ED's Resource Protection Team performed an environmental analysis that included an instream use assessment and that assessment was memorialized in a formal memorandum.⁷⁷ The memorandum is part of the record in this case. The memorandum concludes that the requested amendments should be issued with certain special conditions.⁷⁸ The City's expert witness, Mr. Dunn, testified to his independent expert opinion that instream uses will not be adversely impacted by draft Permit 3985A and made reference to the ED's memorandum.

The ALJ finds that Protestant's and OPIC's evidentiary objections are untimely and without merit. Accordingly, based on the entirety of the record evidence, the ALJ concludes that the special conditions in draft Permit 3985A are adequately protective of the environment and the maintenance of instream uses.

5. Consistency with the State Water Plan and the Relevant Regional Water Plans

Janes Gravel's expert witness, Mr. Koch, testified that Lubbock's Application is not consistent with the 2010 Region O Water Plan because it is not even mentioned in the plan.⁷⁹ He further testified the Application is not consistent with the 2007 State Water Plan (currently in effect) because Lake 8, the project Lubbock abandoned in 2006, is still listed as a recommended reservoir site while the project envisioned in the Application is not mentioned.⁸⁰ Mr. Koch

⁷⁵ 30 TAC § 80.108(e).

⁷⁶ Water Code § 11.131; 30 TAC § 50.131(b)(14).

⁷⁷ ED Ex. 6 at 5.

⁷⁸ *Id.*

⁷⁹ Ex. B at 52.

⁸⁰ *Id.*

contends that to be consistent with the regional or state plans, the project must be specifically mentioned in the plan itself.

Ms. Alexander and Mr. Spear both testified that the approved 2006 and 2010 Llano Estacado Region O Water Plans identify several water conservation strategies developed by Lubbock in an effort to address an anticipated water supply deficit. Among these strategies is the City's plan to further develop its use of treated effluent to meet potable water demands. Mr. Spear testified that the water supply strategies discussed in the Region O plan cannot be implemented without the City having the ability to divert its own treated effluent from points within the North Fork that include specifically delineated plans for the Jim Bertram Lake 7, the Post Reservoir, and the North Fork Diversion Operation.⁸¹ Mr. Spear stated that while the amendments requested in the Application are not specifically mentioned, the City's request to reuse its developed water-based return flows is entirely consistent with the strategies in the approved Regional Water Plan for Region O as well as the State Water Plan.⁸² Ms. Alexander also testified that the Application is not inconsistent with the regional and state water plans because the plans mention reuse of return flows as a recommended strategy for the city.⁸³

Based on the preponderance of the evidence the ALJ finds Lubbock's Application and draft Permit 3985A are consistent with the water conservation strategies recommended for Lubbock in the Regional and State Water Plans.

VI. CONCLUSION AND RECOMMENDATION

The ALJ finds that Lubbock's Application and draft Permit 3985A satisfy all applicable statutory and regulatory requirements. Accordingly, the ALJ recommends that the Commission adopt the attached Proposed Order approving the Application. The Proposed Order contains

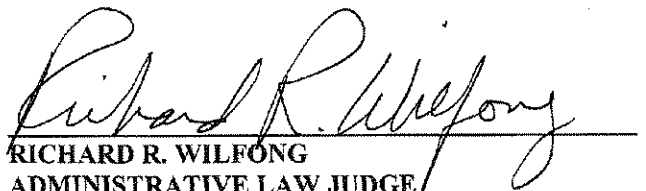
⁸¹ Lubbock Ex. 1 at 21.

⁸² *Id.* at 20-21.

⁸³ ED Ex. 11 at 15.

additional findings of fact and conclusions of law that are not discussed in this PFD because they are not contested.

SIGNED May 25, 2012.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
GRANTING THE APPLICATION BY CITY OF LUBBOCK FOR
AMENDMENT TO WATER USE PERMIT NO. 3985
SOAH DOCKET NO. 582-11-3522
TCEQ DOCKET NO. 2010-0837-WR**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application (Application) of the City of Lubbock (City) to Amend its Water Use Permit No. 3985. A Proposal for Decision (PFD) was presented by Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case from October 18 through October 19, 2011, and March 22, 2012, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

BACKGROUND

1. The City of Lubbock (the City) is located entirely within the Brazos River Basin.
2. The City relies on surface water it purchases from the Canadian River Basin Municipal Water Authority (CRMWA) that is diverted from Lake Meredith, an impoundment of the Canadian River in the Canadian River Basin, for use in meeting the City's municipal water supply needs.

3. The City also relies on groundwater it purchases from CRMWA that is produced from the Ogallala aquifer through CRMWA's groundwater wells in Roberts County for use in meeting the City's municipal water supply needs.
4. The City also relies on groundwater it produces from the Ogallala aquifer through the City's groundwater wells in Bailey County for use in meeting the City's municipal water supply needs.
5. The City treats its Canadian River Basin surface water supplies and its Ogallala aquifer groundwater supplies to drinking water standards and delivers the treated drinking water to the City's potable water supply customers served by its public water supply system.
6. After the City's potable water customers use the City's treated Canadian River Basin surface water and Ogallala aquifer groundwater supplies, the resulting wastewater then makes its way through the City's sanitary sewer system to the City's wastewater treatment plant, where it is treated to applicable water quality standards set and enforced by the TCEQ.
7. The ratio of the City's use of its Canadian River Basin surface water supplies to its use of the City's Ogallala aquifer groundwater supplies fluctuates over time and is influenced predominantly by the relative availability of the supplies to the City.
8. The City's treated effluent is derived from the City's use of Canadian River Basin surface water and Ogallala aquifer groundwater.
9. The City is authorized by TPDES Permit No. WQ0010353002 (the TPDES Permit) to discharge a portion of the City's treated effluent into the North Fork Double Mountain Fork Brazos River, tributary of the Double Mountain Fork Brazos River, tributary of the Brazos River, in the Brazos River Basin (the North Fork).

10. The TPDES Permit authorizes the City to discharge treated effluent into the North Fork at Outfall No. 001 at an average annual flow that is not to exceed 9.0 million gallons per day (10,081 acre-feet per year).
11. Outfall No. 001 is located near the point where F.M. 400 in Lubbock County crosses the North Fork, also being at Latitude 33.5137°N and Longitude 101.6593°W.
12. The TPDES Permit limits the average rate at which the City may discharge at Outfall No. 001 to 13,194 gallons per minute (29.45 cubic feet per second) during any two-hour period.
13. The City began discharging its treated effluent return flows from Outfall No. 001 for the first time in May 2003.
14. Prior to May 2003, the City did not discharge into the North Fork from Outfall No. 001.
15. The treated effluent discharged by the City from Outfall No. 001 has been a varied mixture of the City's developed Canadian River Basin surface water-based treated effluent and its developed Ogallala aquifer groundwater-based treated effluent.
16. Because of declining water storage levels in Lake Meredith, the City's predominant source of potable water supply in recent years has been groundwater produced from the City's and CRMWA's groundwater wells in the Ogallala aquifer.
17. The discharges made from Outfall No. 001 have been comprised predominantly of the City's developed groundwater-based treated effluent.
18. The City is the owner of Water Use Permit No. 3985 (Permit 3985).
19. Permit 3985 was issued to the City by the Texas Water Commission on May 23, 1983.

20. The Texas Water Commission is a predecessor agency of the TCEQ.
21. Permit 3985 authorizes the City to reuse, within the Brazos River Basin, a maximum of 22,910 acre-feet per year of the City's Canadian River Basin surface water-based treated effluent within specified areas of Lubbock and Lynn Counties for industrial and agricultural irrigation purposes, including a maximum of 4,480 acre-feet of treated effluent per year for industrial purposes at the Jones Generating Station in Lubbock County, and 18,430 acre-feet per year for the agricultural irrigation of 10,000 acres of land situated in Lubbock and Lynn Counties.
22. The City is the county seat of Lubbock County.
23. All of the territory that is included in Lubbock County and Lynn County, including Outfall No. 001 and the diversion point, is within the Region O Regional Water Planning Area.
24. The City's municipal water system service area is wholly within the Region O regional water planning area.

PROCEDURAL HISTORY

25. The following were designated as parties to this case:

Party	Representative
City of Lubbock	Jason Hill, Brad Castleberry, Martin Rochelle, Lloyd Gosselink Rochelle & Townsend, P.C.
R. E. Janes Gravel Company	Paul M. Terrill, III, Scott Shoemaker, the Terrill Firm
Clark Wood, Jr.	George Nelson, the George Nelson Law Firm
Lynn Forrest	Oscar B. Jackson, III, Law Office of Oscar B. Jackson III, PLLC
The Forrest Family Partnership, Martha Jean	Lynn Forrest, <i>pro se</i>

Party	Representative
Forrest McNeely, and Marianne and John Loveless	
TCEQ Executive Director	James Aldredge, TCEQ Staff Attorney
TCEQ Office of Public Interest Counsel	James Murphy, TCEQ Office of Public Interest Counsel Attorney

26. The City filed its Application to Amend Water Use Permit No. 3985 on April 27, 2004 (the Application).
27. Commission Staff declared the Application administratively complete on October 12, 2004.
28. Commission Staff filed the Application with the Office of the Chief Clerk on October 12, 2004.
29. On December 22, 2004, the Chief Clerk mailed notice of the Application to the water rights holders of record in the Brazos River Basin.
30. Notice was mailed to two additional downstream water rights holders of record in the Brazos River Basin on February 10, 2005.
31. The TCEQ received multiple requests for a contested case hearing.
32. On August 2, 2006, TCEQ Staff issued draft amendments to Permit 3985, as Water Use Permit No. 3985A (draft Permit 3985A).
33. On February 14, 2011, TCEQ referred the Application to SOAH for a contested case hearing.

34. On March 23, 2011, a preliminary hearing was held at SOAH to establish jurisdiction over the contested case, to designate parties, and to establish a procedural schedule leading to a hearing on the merits.
35. On April 27, 2011, Clark Wood, Jr., withdrew his protest of the Application.
36. A hearing on the merits was held on the Application at SOAH on October 18-19, 2011.
37. On December 7, 2011, the City, the Executive Director, and the Office of Public Interest Counsel filed their initial post-hearing briefs.
38. Protestant R. E. Janes Gravel Company filed its initial post-hearing brief on December 9, 2011.
39. Protestant Lynn Forrest filed his initial post-hearing brief on December 12, 2011.
40. On January 4, 2012, the parties filed their post-hearing reply briefs.
41. On March 22, 2012, a post-hearing conference was held to receive additional legal arguments from the parties.
42. On April 4, 2012, the final hearing transcript was received and the record was closed.
43. On May 25, 2012, the Honorable Administrative Law Judge Richard R. Wilfong issued the Proposal for Decision (PFD).

THE APPLICATION

44. The Application includes a request to amend Permit 3985 to allow the City to convey the volumes of flow created by the discharge of its developed water-based treated effluent from Outfall No. 001 to a downstream diversion point proposed in the Application (the Diversion Point) using the bed and banks of the North Fork.

45. The Diversion Point as proposed in Application is located at the point where County Road 7300 in Lubbock County crosses the North Fork, at Latitude 33.493°N and Longitude 101.624°W, at a point bearing 84.883°W, 129.25 feet from the northeast corner of Section 34, Block S, GCSF Rail Road Co., Abstract 51, approximately 4.5 miles northeast of the City of Slaton, in Lubbock County.
46. The Diversion Point is approximately 14,300 feet, or 2.7 miles, downstream of Outfall No. 001.
47. The Application also includes a request to amend Permit 3985 to allow the City to divert at the Diversion Point the volumes of flow discharged pursuant to a TPDES Permit at Outfall No. 001 (which is an amount not to exceed 10,081 acre-feet per year), less the carriage losses that may occur during the conveyance from Outfall No. 001 to the Diversion Point.
48. The City has requested a maximum diversion rate at the Diversion Point of 29.45 cubic feet per second, which is commensurate with the maximum discharge rate at Outfall No. 001 pursuant to the TPDES Permit.
49. The Application also includes a request to amend Permit 3985 to allow the City to reuse all of its developed Canadian River Basin surface water-based treated effluent, which is an amount not to exceed 22,910 acre-feet per year, for municipal, recreational, industrial and agricultural purposes throughout Lynn County and Lubbock County.
50. The Application also includes a request to amend Permit 3985 to allow the City to reuse all of its groundwater-based treated effluent, which is an amount not to exceed 10,081 acre-feet per year, for municipal, recreational, industrial and agricultural purposes throughout Lynn County and Lubbock County.

51. The Application also includes a request to amend Permit 3985 to allow the City to reuse the volumes of flow diverted at the Diversion Point for municipal, recreational, industrial and agricultural purposes throughout Lynn County and Lubbock County.
52. The Application does not request a new or additional appropriation of State water.
53. The flows created by the City's discharge of its developed water-based treated effluent from Outfall No. 001 are not considered in the TCEQ's water availability model for the Brazos River Basin (the Brazos WAM).
54. The Application requests the authorization to divert and reuse the City's developed water-based treated effluent for beneficial purposes.
55. As part of the Application, the City submitted the *City of Lubbock Water Accounting Plan* (the Accounting Plan).
56. As part of the Application, the City submitted the *City of Lubbock Water Conservation and Drought Contingency Plan* (the Water Conservation and Drought Contingency Plan).
57. Multiple members of the TCEQ technical staff conducted independent reviews of the Application during the technical review process.
58. As part of the technical review of the Application, TCEQ staff analyzed the potential impacts from the amendments requested in the Application on water rights within the Brazos River Basin, which is also known as a "no injury" analysis, and concluded there would be no adverse impact on water rights.
59. As part of the technical review of the Application, the TCEQ staff analyzed whether any water rights in the Brazos River Basin have been granted based on the City's discharge of its developed water-based treated effluent from Outfall No. 001.

60. No water rights have been granted based on the availability of the City's discharge of any of its developed water-based treated effluent from Outfall No. 001.
61. The flows in the North Fork created by the City through discharges of its developed water-based treated effluent at Outfall No. 001 are not part of the normal flow of the North Fork.
62. A water availability analysis using the Brazos WAM was not required for the Application because the Application is not a request for a new appropriation of State water.
63. Any new appropriation issued by TCEQ since 2003 would not have been based on return flows like those that the City discharges from Outfall No. 001 because the Brazos WAM used by TCEQ since 2003 for considerations of requests for new appropriations does not include return flows.
64. As a result of the technical review of the Application, the TCEQ staff determined that no water rights in the Brazos River Basin have been granted based on the City's discharge of its developed water-based treated effluent from Outfall No. 001.
65. The City estimated the carriage losses to be 0.47 percent of the total amount it discharges into the North Fork at Outfall No. 001 and conveys to the Diversion Point.
66. The methodology used by the City to determine the carriage losses associated with the requests made in the Application provides a reasonable assessment of the carriage losses that can be expected to occur between Outfall No. 001 and the Diversion Point.
67. The underlying data used by the City to determine the carriage losses associated with the requests made in the Application is data that is commonly relied upon in the Texas water resources industry for making these types of assessments.

68. The 2.7 river-mile distance between Outfall No. 001 and the Diversion Point provides little opportunity for the loss of significant volumes of flows during the conveyance of the City's developed water-based treated effluent using the bed and banks of the North Fork.
69. The 0.47 percent carriage loss factor used by the City in the Application is a reliable reflection of the carriage losses that will occur during the City's transport of its developed water-based treated effluent from Outfall No. 001 to the Diversion Point.
70. As a result of the technical review of the Application, the TCEQ staff determined that the City's estimate of carriage losses between Outfall No. 001 and the Diversion Point was reasonable and the method used to determine the losses was acceptable.
71. TCEQ staff concluded that the amendments sought in the Application would not impair any water rights within the Brazos River Basin.
72. As part of the technical review of the Application, the TCEQ staff also considered the potential effects on water quality in the North Fork and the Brazos River Basin associated with the amendments requested in the Application and determined that the Application should be approved and draft Permit 3985A should be issued.
73. As part of the technical review of the Application, TCEQ staff also assessed potential impacts on the environment and other instream uses that might be attributable to the amendments requested in the Application and determined that the Application should be approved and the draft Permit 3985A should be issued..
74. TCEQ staff considered U. S. Geologic Survey (USGS) data sources in evaluating the natural flow characteristics of the portions of the North Fork relevant to the Application.

75. As part of their consideration of potential water quality impacts, TCEQ staff considered the 7Q2 method in evaluating potential water quality impacts that might be attributable to the amendments requested in the Application.
76. The 7Q2 value is defined as the lowest average flow for seven consecutive days that is expected to recur every two years.
77. TCEQ staff noted that the 7Q2 value derived from USGS stream gage data on the North Fork collected from 1983-1993 is 0 (zero) cubic feet per second.
78. The natural flow regimes along the portion of the North Fork relevant to the Application are intermittent.
79. The City is not obligated to discharge any volume of its developed water-based treated effluent into the North Fork at any time.
80. As part of the technical review of the Application, TCEQ staff considered the City's authorization pursuant to the TPDES Permit to discharge the City's developed water-based treated effluent into the North Fork at Outfall No. 001.
81. The TPDES Permit places restrictions on the volumes and rates at which the City can discharge its treated effluent into the North Fork at Outfall No. 001.
82. The TPDES Permit is designed to ensure that discharges made into the North Fork pursuant to its terms do not cause a degradation of water quality as provided by Title 30, Chapter 307 of the Texas Administrative Code.
83. By granting the TPDES Permit, the Commission has previously determined that discharges made by the City at Outfall No. 001 in accordance with the TPDES Permit will not cause degradation of water quality in the North Fork.

84. The City has made discharges into the North Fork at Outfall No. 001 in accordance with the terms of the TPDES Permit since the City began discharging from Outfall No. 001 in May of 2003.
85. Any water passing the Diversion Point will have the same, or better, water quality characteristics as the water reaching Outfall No. 001.
86. The diversions requested in the Application will not negatively impact the quality of water in the North Fork.
87. As part of the technical review of the Application, TCEQ staff also considered the proximity between the Diversion Point and the mouth of the Brazos River and numerous major impoundments in the Brazos River Basin.
88. The Diversion Point is located approximately 1,150 river miles from the mouth of the Brazos River, and it is upstream of numerous major impoundments in the Brazos River Basin.
89. Given the remote proximity between the Diversion Point and the mouth of the Brazos River, the diversions proposed in the Draft Amendment would not have any measurable influence on freshwater inflows into the bays and estuaries found at the river's mouth.
90. As part of the technical review of the Application, TCEQ staff also considered that riverine recreation, such as paddling or fishing, is not known to occur on the North Fork.
91. No instream uses would be adversely impacted by the terms of the Draft Amendment.
92. The City did not request in the Application the authority to divert any flows that have historically been in the Brazos River Basin.

93. As part of the technical review of the Application, TCEQ staff considered the potential effects of the amendments requested in the Application on fish and wildlife habitat in the Brazos River Basin.
94. The potential for aquatic organism entrainment or impingement at the diversion facilities proposed in the Application was the only potential adverse environmental impact that was attributable to the amendments requested in the Application.
95. Constructing the diversion facilities to include a screen with a mesh size of 0.25 inches or smaller on the diversion structures, and implementing a maximum flow-through screen velocity of 0.5 feet per second would ensure that fish and wildlife habitat would not be adversely impacted by the diversions proposed in the Application.
96. After considering the potential effects that the amendments requested in the Application would have on the water quality of the North Fork and the entire Brazos River Basin, including the Brazos River Estuary, the TCEQ staff identified no adverse impacts on water quality, estuary health, or recreational and other instream uses attributable to the amendments requested in the Application.
97. The TCEQ staff also reviewed the Accounting Plan as part of the technical review of the Application.
98. The Accounting Plan was provided to TCEQ staff in electronic format, and at the request of the TCEQ staff, it was designed to account by source all water discharged into the North Fork pursuant to the TPDES Permit, the carriage losses from Outfall No. 001 to the Diversion Point, the streamflow immediately upstream of Outfall No. 001, and the volumes diverted at the Diversion Point.
99. The Accounting Plan will provide the City with an effective tool for memorializing discharge and diversion data in a way that will promote compliance with the amendments requested in the Application.

100. The Accounting Plan will provide an efficient means by which TCEQ staff can oversee and verify the City's compliance with the amendments requested in the Application.
101. The Accounting Plan will establish a reliable, consistent methodology for calculating the quantities of water diverted at the Diversion Point by the City under the authority of the Draft Amendment.
102. The Accounting Plan is acceptable.
103. The City's Water Conservation and Drought Contingency Plan was reviewed by TCEQ staff.
104. As part of executing the Water Conservation and Drought Contingency Plan, the City Council of the City has approved various municipal ordinances with provisions designed to enhance the implementation of water conservation measures among the potable water users within the City's public water supply system service area, including provisions relating to water meter accuracy, drought stages and water management measures, and procedures for managing water demand and supply emergencies as well as providing notification of the same to the TCEQ and the members of the general public.
105. The City's conservation ordinances are intended to encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water.
106. The City has made water conservation a priority.
107. The Water Conservation and Drought Contingency Plan satisfies the applicable requirements of the Texas Water Code and TCEQ rules.

108. The City has demonstrated that it has used, and will continue to use, reasonable diligence to avoid waste and achieve water conservation.
109. The City has an obligation to ensure that its water supplies are sufficiently diversified and reliable so that it can deliver potable water and raw water to its customers in a cost-effective manner.
110. The requests made in the Application would provide the City with a chance to make better, more efficient use of its overall existing water supplies.
111. The Diversion Point will be the City's closest source of water supply.
112. The City's water supplies are an important resource throughout Lubbock County and Lynn County.
113. The requests made in the Application will not be detrimental to the public welfare.
114. The requests made in the Application will benefit the public welfare.
115. The requests made in the Application will not adversely impact groundwater quality, groundwater use, or groundwater recharge.
116. The requests made in the Application would provide the City with additional water supply that would help offset the City's use of groundwater as a source of potable and non-potable water supply.
117. The North Fork is not a significant source of recharge to any aquifer designated as a sole source aquifer.
118. The North Fork is not a significant source of recharge to any aquifer governed by a management plan adopted pursuant to Chapter 36, Water Code.

119. The North Fork is not a significant source of recharge to any aquifer that is part of a Priority Groundwater Management Area pursuant to Chapter 35, Water Code.
120. The segment of the North Fork that is relevant to the requests made in the Application is in Lubbock County.
121. The Region O Regional Water Plan was first submitted to the Texas Water Development Board (TWDB) by January 5, 2001, for approval and inclusion in the State Water Plan.
122. Region O Regional Water Plans have been submitted to the TWDB at least every five years since January 5, 2001.
123. The Region O Regional Water Plan was approved by the TEDB and was thereafter included in the State Water Plan.
124. The 2011 Region O Regional Water Plan was submitted to the TWDB and approved in 2010.
125. The TWDB is currently incorporating the essential elements of the 2011 Region O Regional Water Plan into what will become the 2012 State Water Plan.
126. The amendments requested in the Application address a water supply need in a manner that is consistent with the State Water Plan, the 2006 Region O Regional Water Plan, and the 2011 Region O Regional Water Plan.
127. Upon completing the technical review of the Application, the TCEQ staff issued the Draft Amendment and recommended that the Application be approved.

THE DRAFT PERMIT 3985A

128. Under draft Permit 3985A, the City would be authorized to use the bed and banks of the North Fork to convey flows created by the City's discharge of its developed water-based treated effluent from Outfall No. 001 to the Diversion Point.
129. Under draft permit 3985A, the City would be authorized to divert at the Diversion Point an amount not to exceed the volume of flows actually discharged at Outfall No. 001 pursuant to a TPDES Permit, less the associated carriage losses.
130. Under draft Permit 3985A, the City would be restricted to a maximum diversion rate of 29.45 cubic feet per second, which is the maximum discharge rate authorized over any two hour period by the TPDES Permit.
131. Under draft Permit 3985A, the City's existing reuse authorizations under Permit 3985 would be replaced with the authorization to reuse an amount not to exceed 22,910 acre-feet per year of its Canadian River Basin surface water-based treated effluent for agricultural, municipal, industrial, and recreational purposes throughout Lubbock County and Lynn County.
132. Under draft Permit 3985A, the City would also be authorized to reuse an amount not to exceed 10,081 acre-feet per year of its groundwater-based treated effluent for agricultural, municipal, industrial, and recreational purposes throughout Lubbock County and Lynn County.
133. Under draft Permit 3985A, the City's diversions of flows created by the discharge at Outfall No. 001 of its groundwater-based treated effluent pursuant to the TPDES Permit do not have a priority date and are not subject to priority calls from existing water rights holders in the Brazos River Basin.

134. Under draft Permit 3985A, the City's diversions of flows created by the discharge at Outfall No. 001 of its Canadian River Basin surface water-based treated effluent pursuant to the TPDES Permit do not have a priority date and are not subject to priority calls from existing water rights holders in the Brazos River Basin.
135. Draft permit 3985A does not authorize the City to divert any State water.
136. Draft Permit 3985A will not deprive appropriators of state water within the Brazos River Basin of the equivalent quantity or quality of water that was available with the full, legal exercise of existing water rights before the change requested in the Application.
137. The terms and conditions of draft Permit 3985A will not increase any appropriator's legal obligation to a senior water right holder.
138. The terms and conditions of draft Permit 3985A will not substantially affect the continuation of stream conditions as they would exist with the full, legal exercise of existing water rights at the time those water rights were granted.
139. Draft Permit 3985A proposed by TCEQ staff contains multiple layers of protection designed to ensure that the City's exercise of the amended water right would not adversely impact water rights or the environment within the Brazos River Basin.
140. Draft Permit 3985A requires the City to implement a water conservation plan that provides for the use of practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses.
141. Draft Permit 3985A also incorporates into its terms the protective features of the Accounting Plan.

142. The City would only be authorized to make diversions pursuant to draft Permit 3985A in accordance with the Accounting Plan, which ensures that only the flows created by the City's discharge of its developed water-based treated effluent from Outfall No. 001 would be diverted.
143. Draft Permit 3985A requires that the Accounting Plan be maintained in electronic format and made available to the Executive Director and the public upon request.
144. Draft Permit 3985A prohibits any modifications to the Accounting Plan that are not first approved by the Executive Director.
145. Draft Permit 3985A makes clear that any modification made to the Accounting Plan that changes the terms of the Draft Amendment must first be made in the form of an amendment to Permit 3985A.
146. Draft Permit 3985A makes clear that the authorizations made therein are each subject to the City's maintenance of the Accounting Plan and notification to the Executive Director of any necessary changes to the Accounting Plan.
147. Draft Permit 3985A would require the City to apply for and receive specific authorization from TCEQ before the City would be authorized to reuse its developed groundwater-based treated effluent in an amount greater than 10,081 acre-feet per year.
148. Draft Permit 3985A would require the City to apply for and receive specific authorization from TCEQ before the City would be authorized to reuse its developed Canadian River Basin surface water-based treated effluent in an amount greater than 22,910 acre-feet per year.
149. The diversions authorized by draft Permit 3985A are conditioned on the actual availability of the potentially interruptible flows created by the City's discharge of its developed water-based treated effluent from Outfall No. 001.

150. Draft Permit 3985A authorizes the City to divert only the flows created by the City's discharge of its developed water-based treated effluent from Outfall No. 001, less carriage losses associated with the conveyance of the flows from Outfall No. 001 to the Diversion Point.
151. Draft Permit 3985A requires the City to seek and obtain an amendment from the TCEQ to the Draft Amendment if there is a permanent reduction in the volume of treated effluent the City is authorized by the TPDES Permit to discharge at Outfall No. 001.
152. Draft Permit 3985A requires the City to install a screen with a mesh size of 0.25 inches or smaller on the diversion structures constructed at the Diversion Point and to implement a maximum flow-through screen velocity of 0.5 feet per second to minimize entrainment and impingement of aquatic organisms.
153. A mesh size of 0.25 inches is the maximum allowable mesh size for the protective screen on an intake structure according to general permit guidelines established by the U. S. Army Corps of Engineers, Regulatory Branch, Fort Worth District.
154. Draft Permit 3985A requires the City to install and maintain a measuring device that is capable of accounting for, within five percent (5%) accuracy, the quantity of water diverted from the Diversion Point pursuant to paragraph 3 of draft Permit 3985A.
155. Draft Permit 3985A requires the City to provide TCEQ staff members with access to the City's measurement records and the measurement device to independently verify compliance.
156. Draft Permit 3985A requires the City, or a contract customer of the City's, to submit an industrial water conservation plan to the TCEQ at least 90 days before any diversions are made for industrial use.

CONCLUSIONS OF LAW

1. The TCEQ has subject matter jurisdiction over this proceeding pursuant to Sections 5.013(a)(1), 11.042, and 11.122 of the Texas Water Code.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD on TCEQ contested cases referred to it by the Commission pursuant to Section 2003.047 of the Texas Government Code and Section 5.311 of the Texas Water Code.
3. Proper notice of these matters was given as required by Chapter 11, of the Water Code, Chapter 2001 of the Texas Government Code, and by TCEQ's rules.
4. The Application is administratively complete, was accompanied by all required fees, was properly noticed pursuant to Title 30, Section 295.158 of the Texas Administrative Code, and conforms to all other applicable requirements of Chapter 295 of the TCEQ rules; therefore it complies with Title 30, Section 297.41(a)(1) of the Texas Administrative Code.
5. The City must obtain authority from the TCEQ to amend Permit 3985 in the manner provided for in the Application and Draft Permit 3985A. TEX. WATER CODE ANN. § 11.122 (West 2008).
6. The City must obtain prior authority from the TCEQ to convey the flows created by the discharge of its developed groundwater-based treated effluent and its developed Canadian River surface water-based treated effluent from Outfall No. 001 to the diversion point identified in draft Permit 3985A using the bed and banks of the North Fork. TEX. WATER CODE ANN. §§ 11.042(b), (c) (West Supp. 2010); 30 TEX. ADMIN. CODE §§ 297.16(a), (b).

7. Draft Permit 3985A will allow the City to convey, divert and reuse its existing and future developed water-based treated effluent that the City discharges from Outfall No. 001 pursuant to the TPDES Permit, up to 32,991 acre-feet per year, less the carriage losses that occur between Outfall No. 001 and the Diversion Point. TEX. WATER CODE ANN. §§ 11.042(b), (c) (West Supp. 2011); 30 TEX. ADMIN. CODE §§ 297.16(a), (b).
8. Draft Permit 3985A contains special conditions necessary to protect existing water rights, instream uses, and freshwater inflows to bays and estuaries. TEX. WATER CODE ANN. §§ 11.042(b), (c) (West Supp. 2011); 30 TEX. ADMIN. CODE §§ 297.16(a), (b).
9. Draft Permit 3985A will not cause degradation of water quality to the extent that the North Fork's classification would be lowered. TEX. WATER CODE ANN. § 11.042(c) (West Supp. 2011); 30 TEX. ADMIN. CODE § 297.16(c).
10. Even though it is unnecessary to determine whether the requirements of Water Code § 11.134(b), have been met in order to grant the Application, the City proved by a preponderance of evidence that it had met the applicable requirements of that statute.
11. Because the City has requested authorization to divert and reuse its developed water-based treated effluent that it discharges from Outfall No. 001, the Application does not request a new or increased appropriation. Accordingly, the City is not required to demonstrate that unappropriated water is available in the source of supply before the Commission may grant the Application. TEX. WATER CODE ANN. § 11.134(b)(2) (West 2008); 30 TEX. ADMIN. CODE § 297.41(a)(2).
12. The City will beneficially reuse water diverted pursuant to the terms and conditions of draft Permit 3985A. TEX. WATER CODE ANN. §§ 11.134(b)(3)(A), (C) (West 2008); and 30 TEX. ADMIN. CODE § 297.41(a)(3)(A), (C).

13. The City's reuse of the water authorized to be diverted by draft Permit 3985A will not impair any existing water rights or vested riparian rights in the Brazos River Basin. TEX. WATER CODE ANN. §§ 11.134(b)(3)(B) (West 2008); and 30 TEX. ADMIN. CODE § 297.41(a)(B).
14. The amendments made pursuant to draft Permit 3985A are not detrimental to the public welfare. TEX. WATER CODE ANN. §§ 11.134(b)(3)(C) (West 2008); and 30 TEX. ADMIN. CODE § 297.41(a)(3)(C).
15. The amendments requested in the Application, and proposed in draft Permit 3985A, will not adversely affect instream flows, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge. No conditions beyond those contained in the Draft Amendment are necessary to maintain existing instream uses, water quality, or to maintain fish and wildlife habitats, and no actions are necessary to mitigate adverse impacts on such habitats. TEX. WATER CODE ANN. § 11.134(b)(4); 30 TEX. ADMIN. CODE § 297.41(a)(3)(D).
16. Draft permit 3985A would address a water supply need in a manner that is consistent with the State Water Plan and the approved Region O Regional Water Plan. TEX. WATER CODE ANN. § 11.134(b)(3)(E); 30 TEX. ADMIN. CODE § 297.41(a)(3)(E).
17. The City will use reasonable diligence to avoid waste and encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water. TEX. WATER CODE ANN. § 11.134(b)(4); 30 TEX. ADMIN. CODE § 297.41(a)(4).
18. The City has completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001. TEX. WATER CODE ANN. § 16.012(m) (West 2008); 30 TEX. ADMIN. CODE § 297.41(a)(5).

19. The Diversion Point and place of reuse proposed in draft Permit 3985A are wholly within a region subject to a regional water plan that has been approved in accordance with Section 16.053(i) of the Texas Water Code. TEX. WATER CODE ANN. § 11.134(c) (West 2008); 30 TEX. ADMIN. CODE § 297.41(b).
20. The City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement.
21. The evidence admitted in this case supports granting the Application and issuing draft Permit 3985A.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT:

1. The attached Amendment to a Water Use Permit, Permit 3985A, is granted to the City of Lubbock, Texas.
2. The Chief Clerk of the Commission shall forward a copy of this Order to all parties and issue the attached permit as changed to conform to this Order.
3. All other motions, requests for specific Findings of Fact or Conclusions of Law, and other requests for general and specific relief, if not expressly granted, are denied for want of merit.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.

5. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV. CODE ANN. § 2001.144.

ISSUED: _____

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D, Chairman
For the Commission